

- (1) Whether the filing of a request to reassign the case made pursuant to K.S.A. 44-523(c) automatically removes the case from the jurisdiction of the administrative law judge.
- (2) Whether the report and deposition testimony of Dr. Richard A. Rosa should be excluded from the record because the report from Dr. Rosa was not provided to claimant's counsel within 15 days of the examination as required by K.S.A. 44-515.

- (3) What is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board finds and concludes as follows:

- (1) The Administrative Law Judge did have jurisdiction to render the Award, notwithstanding the request to reassign the case made pursuant to K.S.A. 44-523(c).

K.S.A. 44-523(c) requires the Director to reassign a case upon notification that a decision has not been made within 30 days after the case was submitted for decision. This case was submitted for decision by letter dated October 17, 1995. When a decision was not rendered within 30 days, respondent requested that the case be reassigned. On January 4, 1996, before the Director reassigned the case, the Administrative Law Judge rendered his Award. The Board has previously held, and does so here, that the filing of the request to transfer does not deprive the Administrative Law Judge of jurisdiction. The Administrative Law Judge retains jurisdiction until the case is, in fact, reassigned. See Reinhart v. Superior Industries Int'l, Docket No. 180,932 (June 1995).

- (2) The report and deposition of Dr. Richard A. Rosa should be considered as part of the evidence and record in this case.

Claimant objects to including as part of the record the opinions of Dr. Rosa on grounds that respondent did not provide Dr. Rosa's report within 15 days of the date Dr. Rosa examined claimant. The record shows that claimant received the complete report some eight days before the deposition of Dr. Rosa and earlier received a partial report. Claimant's counsel admits respondent faxed the complete report to claimant's counsel the day respondent's counsel received it. The record contains no indication claimant was unfairly surprised or prejudiced. The key aspect of Dr. Rosa's report was that he rated only claimant's upper extremity, not his body as a whole. Dr. Hopkins had previously done the same. The report did not raise unique, new or surprising issues. The Appeals Board, therefore, has considered the report and deposition of Dr. Rosa as part of the record in this case. Elam v. Hutchinson Correctional Facility, Docket Nos. 179,845 and 180,405 (February 1996).

- (3) The Appeals Board agrees with and affirms the finding that claimant has a 43 percent permanent partial general body disability.

Respondent contends the Award in this case should be based on injury to claimant's left upper extremity only and it should be treated as a scheduled injury. Claimant, on the other hand, argues for general body disability and emphasizes evidence of ongoing complaints to the cervical and lumbar spine. The record contains medical expert opinion supporting both positions. Neither party expresses significant concern about the 43 percent found by the Administrative Law Judge if the injury is determined to be an injury to the body as a whole.

Claimant was injured on July 29, 1991 when he reached his left arm into a machine to clear a jam. The machine unexpectedly resumed operation and jerked claimant into the machine. Claimant was pulled off the ground, pulling his ribs up against the frame of the machine before it could be stopped. Claimant was taken to the emergency room of the K.U. Medical Center and surgery was performed. Plates were put into the forearm to reduce the fractures. Claimant underwent seven or eight additional surgeries over the next one and one-half years, including tendon transfers, skin grafts and scar revisions.

Three physicians testified regarding the ultimate resulting disability. Dr. James P. Hopkins and Dr. Richard A. Rosa rated claimant's impairment as an

impairment to the upper extremity only. Dr. Nathan Shechter, on the other hand, rated the impairment as an impairment to the body as a whole.

The Appeals Board has, for several reasons, concluded the Award should be based on a general body disability, not a scheduled upper extremity. First, the description of the accident is consistent with the possibility of a cervical injury. Second, claimant consistently reported complaints to his cervical spine from shortly after the accident and continuing through the time of the regular hearing approximately three and one-half years after the accident. This included complaints noted in the reports of all three testifying physicians. Finally, it appears neither Dr. Hopkins nor Dr. Rosa included impairment to the cervical spine in their rating, in large part, because they found no evidence the injury affected range of motion in claimant's cervical spine, a factor emphasized in the AMA Guides. However, the accident in this case occurred at a time when the AMA Guides were not the express standard for determining impairment.

The Appeals Board notes parenthetically that claimant's counsel has represented that Dr. Hopkins only rates upper extremities. Claimant urges the Board to consider this factor as an explanation for the fact Dr. Hopkins rates claimant only at the upper extremity in this case. The record, however, contains no evidence to support this assertion by claimant's counsel. In addition, it seems clear from Dr. Hopkins' testimony that he limited his rating to the upper extremity because he found no basis for rating anything else, not that he does not rate anything else. The Appeals Board has, therefore, evaluated and weighed Dr. Hopkins testimony on the assumption that he would rate the body as a whole if he had found, in his opinion, a basis for doing so. The Appeals Board, for the reasons expressed, nevertheless, disagrees with his conclusion and finds that the Award should be based on disability to the body as a whole.

Finally, the Appeals Board agrees with and adopts the conclusion claimant has a 43 percent disability. This conclusion is based on the opinion expressed by Dr. Shechter that claimant has a 43 percent general body functional impairment. Vocational expert Bud Langston testified regarding the impact of claimant's injury on his ability to access the open labor market. Giving equal weight to the labor market loss and to a wage loss based on comparison of claimant's actual pre-injury and actual post-injury wage yields a work disability of 39 percent, less than the 43 percent functional impairment. Claimant is, therefore, entitled to an award based on functional impairment. K.S.A. 1991 Supp. 44-510e.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Floyd V. Palmer should be, and the same is hereby, affirmed.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jean Marc Guignet, and against the respondent, Bobst Group, and its insurance carrier, Zurich American Insurance Company, for an accidental injury which occurred July 29, 1991, and based upon an average weekly wage of \$1,125.29, for 89.86 weeks of temporary total disability compensation at the rate of \$289.00 per week or \$25,969.54, followed by 325.14 weeks at the rate of \$289.00 per week or \$93,965.46 for a 43% permanent partial general body impairment of function, making a total award not to exceed \$100,000.00 the maximum allowed by statute.

As of June 7, 1996, there is due and owing claimant 89.86 weeks of temporary total disability compensation at the rate of \$289.00 per week or \$25,969.54, followed by 163.71 weeks of permanent partial disability compensation at the rate of \$289.00 per week in the sum of \$47,312.19, for a total of \$73,281.73 which is ordered paid in one lump sum less

any amounts previously paid. The remaining balance is to be paid for 92.45 weeks at the rate of \$289.00 per week, until fully paid or further order of the Director.

Claimant is awarded future medical treatment for the removal of the plate in his left forearm by a qualified orthopedic surgeon designated by the respondent and insurance carrier and is further awarded medical treatment related to this injury upon application to the Director.

The fees of claimant's attorney are approved up to 25% of the recovery, pursuant to K.S.A. 44-536.

The claimant is awarded unauthorized medical treatment expense up to the statutory maximum of \$350.00 upon presentation of proper itemized statements.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and insurance carrier to be paid as follows:

Nora Lyon & Associates	\$166.90
Nora Lyon & Associates	\$ 57.40
Metropolitan Court Reporters, Inc.	\$128.60
Metropolitan Court Reporters, Inc.	\$ 50.50
Hostetler & Associates, Inc.	\$161.85
Hostetler & Associates, Inc.	\$213.80
Hostetler & Associates, Inc.	\$105.60

IT IS SO ORDERED.

Dated this ____ day of June 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Kansas City, KS
Wade A. Dorothy, Lenexa, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director